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No. 84-801

In The
Supreme Court of the United States
October Term, 1984

MIDLANTIC NATIONAL BANK,
Petitioner,

vs.

THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

RESPONSE IN OPPOSITION TO PETITION OF MIDLANTIC NATIONAL BANK FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals for the Third Circuit was correct in holding that a bankruptcy trustee's ability to abandon burdensome and valueless property under 11 *U.S.C.* §554 (1982) is conditioned upon compliance with state police power regulations.

2. Whether the decision of the Court of Appeals for the Third Circuit is in conflict with the decision of this Court in *United States v. Security Industrial Bank*, 459 *U.S.* 70, 103 *S.Ct.* 407, 74 *L.Ed.*2d 235 (1982).

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No. 84-801

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MIDLANTIC NATIONAL BANK,
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vs.

THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Respondent.

RESPONSE IN OPPOSITION TO PETITION OF MIDLANTIC NATIONAL BANK FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

COUNTERSTATEMENT OF THE CASE

This case results from an appeal by the New Jersey Department of Environmental Protection (hereafter "NJDEP") from an order of the United States Bankruptcy Court for the District of New Jersey allowing the trustee in bankruptcy for Quanta Resources Corporation to abandon a waste oil reprocessing facility in Edgewater, New Jersey. The Bankruptcy Court relied on 11 *U.S.C.* §554, which governs abandonment of property of the bankrupt's estate.

Quanta Resources Corporation is a Delaware corporation which was formed in March, 1980 to engage in the

business of waste oil recovery at several sites in New York and in Edgewater, New Jersey. It leased the property in New Jersey from James V. Frola and Albert Von-Dohlin.

With regard to the New Jersey facility, Quanta had taken it over in July, 1980. It had been used by a previous company which had been granted a temporary operating authorization from NJDEP, which specifically prohibited acceptance of polychlorinated biphenyls (PCB's), an extremely hazardous substance, at the facility. When Quanta took over the facility a similar restriction was placed in its temporary operating authorization. Quanta accepted waste oil and other liquids at the property and put it in its tanks, where it was reprocessed and resold.

A sampling of waste at the site by NJDEP in June, 1981, revealed that PCB's were present in the liquids in the tanks in excess of the permissible standards in the temporary operating authorization. On July 2, 1981, Quanta agreed, at NJDEP's request, to cease operations at the site. Following the shutdown, NJDEP and Quanta began negotiations regarding the cleanup of the property, but on October 6, 1981, Quanta filed for reorganization under Chapter 11 of the Bankruptcy Code. On October 7, 1981, NJDEP issued an Administrative Order to Quanta requiring that it cease operations and clean up all hazardous materials at the site. On November 12, 1981, without the work having been performed as ordered, Quanta filed for conversion of the proceeding in the Bankruptcy Court to a liquidation under 11 *U.S.C.* §701 *et seq.*

The New Jersey facility, at the time of bankruptcy filing, included tanks holding approximately 3.5 to 5 mil-

lion gallons of oil, oil sludge, and other liquids. About 400,000 gallons of this oil and sludge contained PCB's in excess of the permissible standard. Approximately 650,000 gallons of the oil that was on the site was able to be sold and was sold after the bankruptcy filing. The proceeds from the sale were placed in an escrow account. To date, the other liquids remain on the site.

On May 20, 1983, an order was entered by the Bankruptcy Court authorizing the abandonment of the New Jersey property, effective May 17, 1983 *nunc pro tunc* (App. p. 1a to 2a).

On September 21, 1983, NJDEP filed a Notice of Appeal by Agreement to the Court of Appeals under 28 *U.S.C.* §1293(b).

The Opinion of the Third Circuit was filed on July 20, 1984, reversing the decision of the Bankruptcy Court (App. p. 3a to 12a). The Trustee filed a petition for rehearing, and on August 16, 1984, rehearing was denied (App. p. 13a to 14a).

———o———

ARGUMENT

A.

THE DECISION OF THE COURT OF APPEALS THAT ABANDONMENT OF BURDENSOME PROPERTY UNDER 11 U.S.C. §554 IS SUBJECT TO STATE POLICE POWER RESTRICTIONS IS NOT SUCH A NOVEL AND UNSETTLED QUESTION OF FEDERAL LAW THAT THIS COURT SHOULD ACCEPT JURISDICTION.

The decision of the Court of Appeals for the Third Circuit in this matter is neither so novel or unusual that this Court should grant a petition for writ of *certiorari* requested by the petitioner. The question faced by the Court of Appeals was simply whether the legislative intent of Congress in enacting 11 *U.S.C.* §554 was to override the ability of States to enforce their police power regulations. Although the matter is one of first impression in the Court of Appeals, the interpretation given to the section by the Court of Appeals is consistent with earlier decisions on the question of the power of a trustee to abandon property. *Ottenheimer v. Whitaker,* 198 *F.*2d 289 (4th Cir. 1952); *In re Lewis Jones, Inc.,* 1 *Bkr. Ct. Dec.* 277 (Bkrtcy, Pa. 1974). In both of those cases the power of the trustee to abandon property was limited by the need to comply with State and local police power requirements.

In addition, this matter is not such an important one because the decision merely held that a trustee must hold on to property rather than abandon it during the course of the liquidation of an estate. The court specifically refused to decide, and remanded to the Bankruptcy Court, the key question to all parties involved, that is, what, if any, funds of the bankrupt estate must be expended on compliance with State and local police power requirements. Therefore, a secured creditor such as petitioner here is not placed in any different position than it would have been before this decision. The secured party still has a right under the Bankruptcy Code to seek a relief from the automatic stay, 11 *U.S.C.* §362(d), and take possession of its collateral.

Therefore, the concern expressed in petitioner's brief, regarding the alleged uncertainty to commercial lending institutions created by the decision of the Court of Appeals, is specious and need not be addressed by this Court.

B.

THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S OPINION IN UNITED STATES v. SECURITY INDUSTRIAL BANK, 459 U.S. 70, 103 S.Ct. 407, 74 L.Ed.2d 235 (1982).

Petitioner contends that the decision of the Court of Appeals is in conflict with this Court's decision in *United States v. Security Industrial Bank,* 459 *U.S.* 70, 103 *S.Ct.* 407, 74 *L.Ed.* 2d 235 (1982), and therefore this Court should grant the writ of *certiorari* in this case. Respondent, NJDEP, submits that the decision of the Court of Appeals is consistent with this opinion, and therefore, *certiorari* should not be granted.

Security Industrial Bank simply stated the well-known principle of construction that constitutional questions should not be addressed if there is another way to interpret a statute to avoid the need to reach those questions. In *Security Industrial Bank* this Court was faced with the question of whether 11 *U.S.C.* §552(f) should be applied retroactively. This Court held that, since there was clearly no intent on the part of Congress to apply that section retroactively, there was no constitutional taking question that need be decided if retroactivity were found to apply.

Here, however, there is no legislative history or other clear evidence of Congressional intent regarding §554 of the Bankruptcy Code. Petitioner has raised the "taking" question, and thus has raised an issue which respondent contends need not be reached for the following reason.

It is not clear from the record whether the inability of the trustee to abandon the property will deplete the assets of the estate or the assets of any creditor. As the Court of Appeals noted, "the trustee argues that use of the estate's assets to comply with State law *may* deplete the estate . . ." (emphasis added). Failure to abandon has no effect on any particular creditor, since secured creditors still have the right to seek relief from the automatic stay and foreclose on their collateral, 11 *U.S.C.* §362(d), and all other creditors will be in the same position as they were before any attempt to abandon. The court below did not even reach the question of what priority any government expenditures would have in the distribution of the estate. It specifically remanded that question to the Bankruptcy court (App. p. 8a).

Therefore, contrary to petitioner's assertion, the decision of the Court of Appeals has no effect on petitioner's assets, and thus there can be no taking issue in this case. This court would thus be applying the principle of *Security Industrial Bank*, to avoid unneeded constitutional questions, by not taking this case and allowing the remand to proceed in the Bankruptcy Court.

———o———

CONCLUSION

Petitioner has failed to demonstrate in its petition that the decision of the Court of Appeals is either in conflict with other federal court opinions or the opinions of this Court, and has also failed to show that the questions involved are either novel or so important that the matter should be accepted by this Court. Therefore, respondent NJDEP respectfully requests that this Court deny the Petition for Writ of Certiorari to the Court of Appeals for the Third Circuit.

DATED: Trenton, New Jersey
January 16, 1985

Respectfully submitted,

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APPENDIX

Order Authorizing Abandonment of Property of the United States Bankruptcy Court for the District of New Jersey

(Filed—May 20, 1983)

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY

Case No. 81-05967

IN RE:

QUANTA RESOURCES CORPORATION
a corporation of the State of Delaware,

Debtor.

ORDER AUTHORIZING ABANDONMENT OF PROPERTY

This matter having been opened to the Court by Nolan, O'Neill & Moore, attorneys for Thomas J. O'Neill, Trustee in Bankruptcy of Quanta Resources Corp., debtor, upon a Notice to Creditors of Proposed Abandonment dated April 23, 1983, and notice having been given to the debtor, its creditors, and other parties in interest of the Trustee's proposed abandonment of the property and of the opportunity to object and request a hearing on such proposed abandonment, and an objection having been filed by the

State of New Jersey, Department of Environmental Protection, and the matter coming on to be heard before the Court on May 17, 1983, William F. McEnroe, Esq. of Nolan, O'Neill & Moore, appearing on behalf of the Trustee, Richard F. Engel, Deputy Attorney General, appearing on behalf of the Department of Environmental Protection, and Richard B. Honig, Esq. of Klinger, Honig, Redish & Klinger, appearing on behalf of the landlords, Frola and VonDohlin, and the Court having heard and considered argument of counsel and for good cause shown;

It is on this 20th day of May, 1983;

Ordered that Thomas J. O'Neill, Trustee, be and he is hereby authorized to abandon the contents of the tanks located on the premises located at 1 River Road, Edgewater, New Jersey, consisting of mixed industrial and automotive oil, sludge and water, together with any other personal property of the debtor corporation located on said premises and also including any leasehold interest of the Trustee in the premises but reserving to the Trustee possession of that oil which is the subject matter of a sale to Valley Forge Engineering Inc. which oil shall remain in the possession of the Trustee pending completion of the sale, and it is

Further Ordered that entry of this Order shall be deemed to constitute the abandonment of the aforesaid property by the Trustee effective May 17, 1983, *nunc pro tunc.*

D. Joseph DeVito
United States Bankruptcy Judge

Opinion of the United States Court of Appeals for the Third Circuit (No. 83-5730)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 83-5730

IN RE: QUANTA
RESOURCES CORPORATION

Debtor

THE NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION

Appellant

On Appeal from the United States
Bankruptcy Court for the
District of New Jersey

(Bankruptcy No. 81-05967)

Submitted Under Third Circuit Rule 12(6)
June 19, 1984

Before: GIBBONS, GARTH and
HIGGINBOTHAM, *Circuit Judges*

(Opinion Filed July 20, 1984)

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OPINION OF THE COURT

GARTH, *Circuit Judge.*

This appeal presents us with the identical issue presented by the companion case of *In re Quanta Resources Corp. (City of New York and State of New York v. Quanta Resources Corp.),* No. 83-5142. Because we have decided to reverse the district court's order in the companion case, in which New York was the appellant, we will also reverse the bankruptcy court's order in this case.

I.

Quanta Resources Corp. (Quanta) leased and operated a facility on a site in Edgewater, New Jersey, at which Quanta processed and resold waste oil and oil sludge. Quanta operated the site under "temporary operating authorities" (TOA's) issued by the New Jersey Department of Environmental Protection (NJDEP). These TOA's prohibited Quanta from accepting PCB-contaminated oil.

On June 23, 1981, NJDEP found PCB-contaminated oil at the site. On July 2, 1981, Quanta agreed to cease operating at the Edgewater location. On October 6, 1981, while NJDEP and Quanta were negotiating as to Quanta's obligation to clean up the contaminated oil, Quanta filed a petition in bankruptcy under chapter 11 of the Bankruptcy Code, an action which was later (on November 12, 1981) converted to a chapter 7 liquidation. On October 7, 1981, NJDEP issued an administrative order requiring Quanta to cease operations, close the facility within one year, and clean up all hazardous materials.

On April 23, 1983, the Trustee for Quanta gave notice of proposed abandonment of the facility under 11 U.S.C. § 554 of the Bankruptcy Code, including the waste oil contained in tanks. The Trustee excepted from this notice that part of the oil which was free of significant contamination from PCB's and was the subject of a pending sale agreement.

NJDEP opposed the abandonment, arguing that the abandonment would violate New Jersey law because oil contaminated with PCB's must be stored and disposed of in compliance with state regulations. According to the state, abandonment would contravene these requirements and pose a threat to public health and safety because the oil was stored in leaking and insecure tanks, creating a danger of spillage into the Hudson River. NJDEP argued that the estate had sufficient funds to protect the public from the hazards.

After a hearing, by order dated May 20, 1983, the Bankruptcy Court authorized the requested abandonment of the oil, the order stating that its entry was to "be deemed to constitute the abandonment of the . . . property by the Trustee effective May 17, 1983, *nunc pro tunc.*" *In re Quanta Resources Corp.*, No. 81-05967 (Bankr. D.N.J. May 20, 1983). The sale of the remaining oil was completed in June 1983, and the Trustee vacated the premises on July 1, 1983.

The parties consented to NJDEP's taking a direct appeal to this court under 11 U.S.C. § 405(c)(1)(B). We therefore have appellate jurisdiction. See 28 U.S.C. § 1293(b) & Note preceding *id.* § 1471 (appellate jurisdiction to consider such appeals).

II.

The instant case does not present us with a significantly different factual situation from that presented to us in *In re Quanta Resources Corp.*, No. 83-5142. In this case, abandonment of the property and the toxic oils will effect a disposal of toxic waste in a manner that contravenes New Jersey environmental protection law.[1] There is no principled distinction between the issues presented in this case and those presented in the companion *Quanta* case in which New York is the appellant. Thus the analysis and reasoning of No. 83-5142 apply equally to the case at bar. We hold that the Trustee does not have the right to abandon property of the estate where abandonment contravenes state public health and safety laws, as it does here.

Because NJDEP—unlike the City and State of New York in the companion case at 83-5142—has not argued that it should be reimbursed for any expenses incurred in cleaning up or restoring the property (indeed NJDEP has not asserted that it incurred any such expenses),[2] we have no cause to address that issue. This point serves to emphasize the scope of our central holding in these two cases—that enforcement of state public health and safety

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1. NJDEP argues that federal environmental law is also violated by the abandonment. Since NJDEP has not persuaded us that it has the power to enforce federal law in this situation, there is no issue before us as to a conflict between the abandonment power under § 554 of the Bankruptcy Code and federal environmental protection law.

2. NJDEP did claim an interest in the property prior to abandonment, as did Midlantic National Bank, an appellee here. However, the nature of that interest has not been disclosed to us and it is not a factor for consideration on this appeal.

laws is not superseded by the power of abandonment contained in section 554 of the Bankruptcy Code. The issue is not who should pay to clean up the estate's property; it is whether the Trustee's interest in preserving the estate should prevail over the public's interest in containing the hazards produced by toxic wastes in the possession of the estate. As in the companion case where the State and City of New York are appealing, we are convinced that the equities must be balanced in favor of the public interest.

III.

The bankruptcy court's order authorizing abandonment of the estate's property at the Edgewater site will be reversed and the case remanded to the bankruptcy court for further appropriate proceedings in light of both *Quanta* opinions.

GIBBONS, *Circuit Judge,* dissenting:

The same issue is before us as was presented in the companion case *In re Quanta Resources Corp. (City of New York and State of New York v. Quanta Resources Corp.),* No. 83-5142. I would affirm the bankruptcy court's order in this case for the same reasons stated in my dissent in the companion case.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

Orders Amending Opinion (No. 83-5730)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 83-5730

IN RE: QUANTA RESOURCES CORPORATION
Debtor

THE NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION
Appellant

Before: GIBBONS, GARTH and
HIGGINBOTHAM, *Circuit Judges*

ORDER AMENDING OPINION

IT IS ORDERED that the opinion in the above-captioned matter, filed July 19, 1983, is hereby amended as follows:

Add, immediately after the last sentence of the opinion, the following new paragraph:

Each party will bear its own costs.

BY THE COURT,

Leonard I. Garth

.....

Circuit Judge

DATED: July 25, 1984

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 83-5730

IN RE: QUANTA
RESOURCES CORPORATION

Debtor

THE NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION

Appellant

On Appeal from the United States Bankruptcy Court
for the District of New Jersey

(Bankruptcy No. 81-05967)

Submitted Under Third Circuit Rule 12(6)
June 19, 1984

Before: GIBBONS, GARTH and
HIGGINBOTHAM, *Circuit Judges*

(Opinion Filed July 20, 1984)

ORDER

It is ORDERED

That so much of the designation of attorneys for the appellant that appears on the cover of the above entitled opinion be amended to read as follows:

Irwin I. Kimmelman
Attorney General of New Jersey
James J. Ciancia
Assistant Attorney General
Richard F. Engel
Deputy Attorney General
Ross A. Lewin, Esq.
Deputy Attorney General

By the Court
/s/ Leonard I. Garth
United States Circuit Judge

Dated: August 17, 1984

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

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Judgment of the United States Court of Appeals for the Third Circuit (No. 83-5730)

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5730

IN RE:

Quanta Resources Corporation,

Debtor

The New Jersey Department of Environmental Protection,

Appellant.

(Bankruptcy No. 81-05967)

ON APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF NEW JERSEY, Newark

Present: GIBBONS, GARTH and HIGGINBOTHAM, *Circuit Judges.*

AMENDED JUDGMENT

This cause came on to be heard on the record from the United States Bankruptcy Court for the District of New Jersey and was submitted under Third Circuit Rule 12(6) on June 19, 1984.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court filed May 20, 1983 be, and the same is hereby reversed and the cause remanded to the said Bankruptcy Court for further appropriate proceedings in light of this Court's opinions in this appeal and in *In re Quanta Resources Corp., (City of New York and State of New York* v. *Quanta Resources Corp.),* No. 83-5142 (3rd Cir. July 20, 1984). Each party will bear its own costs.

ATTEST:

SALLY MRVOS
Clerk

July 25, 1984

Certified as a true copy and issued in lieu of a formal mandate on August 28, 1984

Test:

M. ELIZABETH FERGUSON
Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.

Order Denying Petition for Rehearing of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-5142

IN THE MATTER OF
QUANTA RESOURCES CORP., at corporation of the State of Delaware,

Debtor

THE CITY OF NEW YORK and
THE STATE OF NEW YORK

v.

QUANTA RESOURCES CORP., a corporation of the State of Delaware,

State of New York
and City of New York

Appellants

No. 83-5730

IN RE:

QUANTA RESOURCES CORPORATION

Debtor

THE NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION

Appellant

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*

The joint petition for rehearing filed by debtor, Quanto Resources Corporation, and appellee, Thomas J. O'Neill, in the above-entitled case having been submitted to the judges who participated in the decision of this court, and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judge Gibbons would grant the petition for rehearing for the reasons set forth in his dissenting opinions.

By the Court
LEONARD I. GARTH
Circuit Judge

DATED: August 16, 1984